STATE OF MICHIGAN
IN THE SUPREME COURT

TIM EDWARD BRUGGER, II,

Plaintiff/Appellee,

vs.

BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF MIDLAND, AKA MIDLAND COUNTY ROAD COMMISSION, a Governmental agency,

Defendant/Appellant.

Supreme Ct. Docket No.158304

Court of Appeals No.: 337394

Lower Court No.: 15-2403-NO B
Midland County Circuit Court

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PLAINTIFF BRUGGER'S RESPONSE TO DEFENDANT MIDLAND COUNTY'S SUPPLEMENTAL AUTHORITY

This matter was held in abeyance by this Court pending it's resolution of *W A Foote Mem Hosp v. Michigan Assigned Claims Plan*, Docket No. 156622; lower court opinion 321 Mich App 159 (2017).

The Defendant in this matter had previously argued that the decision of *W A Foote* compelled the retroactive application of the court of appeals decision, *Streng v Bd of Mackinac Co Rd Comm'rs,* 315 Mich. App. 449 (2016).

The Court of Appeals in *W A Foote* had held that this Court had effectively repudiated the holding of *Pohutski v City of Allen Park*, 465 Mich 675 (2002), and its 3-factor test. The Defendant in this case had argued that given *W A Foote's* holding that *Pohutski* was no longer good law, the lower court in this matter committed reversible error in its analysis and conclusion that the *Streng* decision had only prospective application.

The holding by the court of appeals in *W A Foote* that *Pohutski* was no longer valid was vacated by this Court's Order of October 25, 2019. Other than this Court's acknowledgement that the *Pohutski's* three-factor test is still valid, the *W A Foote* decision offers little else in the way of authority as to the issues in this case.

This case involves two competing notice provisions, and their application to county road commission cases. (The 120-day notice provision found in MCL 691.1404(1), and the 60-day notice provision found in MCL 224.21(3))

Defendant characterizes this as a situation where a statutory provision (MCL 224.1) was on the books, but had been simply overlooked and not enforced. The reality is much more complicated. MCL 224.21(3) while "on the books" had been previously found to be unconstitutional by this Court. That finding was never

explicitly overturned. The reality is that, MCL 224.21(3) had not been applied by any Michigan Court for several decades until *Streng,* revived it.

The Court of Appeals in *Streng* found that this Court in *Rowland v. Washtenaw Co Rd Comm*, 477 Mich 197 (2007), had effectively repudiated its prior holding regarding the constitutionality of MCL 224.21(3). However, the *Rowland* Court did not explicitly say as much, and more importantly applied the 120-day notice provision and not the 60 day notice provision even though it was a county road commission case.

It was within this context that the Court of Appeals in this case considered the threshold question required by *Pohutski*. The court reasoned:

> We conclude that *Streng* should be given prospective–only application and that therefore, the 120-day notice provision of MCL 691.1404(1) is applicable to this case. Because our Supreme Court in *Rowland* did not explicitly overrule binding precedent establishing the 120-day notice requirement of the GTLA as the governing provision in actions against county road commission defendants, and no case has been decided on the basis of MCL 224.21(3) for at least 46 years, we conclude that *Streng* effectively established a new rule of law departing from the longstanding application of MCL 691.1404(1) by Michigan Courts. (citations omitted). *Brugger v. Midland Co Board of Rd Comm'rs*, 324 Mich App 307, 316(2018).

Nothing in this Court's Order in *W A Foote* changes or refutes the above analysis regarding *Pohutski's* threshold question. Therefore, Plaintiff would again respectfully request that this Court deny application for leave.

Dated: 11/13/2019

BY: */S/ PATRICK A. RICHARDS*

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